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No. 71-1103

In the Supreme Court of the United States

OCTOBER TERM, 1971

G. PETER HONCHOK and R. DOYLE GRABARCK, ET AL.,
PETITIONERS

v.

CLIFFORD M. HARDIN, SECRETARY OF AGRICULTURE,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE SECRETARY OF AGRICULTURE IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals is not yet reported (Pet. App. 13A). The opinion of the district court is reported at 326 F.Supp. 988 (Pet. App. 1A).

JURISDICTION

The judgment of the court of appeals (Pet. App. 13A) was entered on December 2, 1971. The petition

for a writ of certiorari was filed on February 28, 1972. Petitioners assert that the jurisdiction of this Court rests on 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether the convening of a three-judge district court was required to determine petitioners' challenge to the constitutionality of the General Mining Law of 1872, on the ground that, with the passage of time, that Act has become a taking of property equitably owned by petitioners as *cestuis que trust* in common with all other citizens of the United States, without due process of law and without just compensation, in violation of the Fifth and Ninth Amendments.

STATUTES INVOLVED

The pertinent provision of the General Mining Law of 1872, 17 Stat. 91, 30 U.S.C. 22, is set forth at Pet. 4.

STATEMENT

Petitioners, citizens of Maryland and West Virginia, filed a complaint in the United States District Court for the District of Maryland against the Secretary of Agriculture and the American Smelting and Refining Company seeking to enjoin any mining in Challis National Forest in Idaho or in any other national forest, on the ground that the General Mining Law of 1872, 17 Stat. 91, 30 U.S.C. 21, *et seq.*, is unconstitutional. Petitioners asserted that with the passage of time the General Mining Law of 1872 has

become a taking of property equitably owned by plaintiffs as *cestuis que trust* in common with all other citizens of the United States, without due process of law and without just compensation, in violation of the Fifth and Ninth Amendments.

The Secretary and American Smelting moved to dismiss the complaint for lack of jurisdiction and venue, for lack of standing and on the merits.

The district court denied the request for a three-judge court. The court dismissed the complaint with respect to the Secretary on the ground of improper venue (Pet. App. 4A). After finding that jurisdiction and venue existed with respect to American Smelting, it dismissed the complaint on the merits, holding that the constitutional claim regarding mining laws in general, and the General Mining Law of 1872 in particular, was insubstantial (Pet. App. 5A-12A).[1] The court of appeals affirmed *per curiam* (Pet. App. 13A).

ARGUMENT

The district court properly dismissed the complaint against the Secretary. Petitioners sued the Secretary in his official capacity and since all defendants were not officers of the United States, see 28 U.S.C. 1391 (e), venue was not proper in the District of Maryland, where the suit was instituted. See 28 U.S.C. 1391(a) and (b). Neither in the court of appeals

[1] The court did not decide whether petitioners had standing to sue (Pet. App. 5A).

nor in their petition for certiorari, have petitioners challenged this aspect of the district court's decision.

On the merits, the district court properly concluded that petitioners' challenge to the General Mining Law of 1872 did not present a substantial constitutional question warranting the convening of a three-judge court, and that the action should be dismissed.

Article IV of the Constitution commits to Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *." The government's power of disposal is plenary. *Ruddy* v. *Rossi*, 248 U.S. 104, 106; see *United States* v. *California*, 332 U.S. 19, 27; *Gibson* v. *Chouteau*, 13 Wall. 92, 99.

Thus, in *Alabama* v. *Texas*, 347 U.S. 272, where two states not benefited by the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. 1301-1315 (Alabama and Rhode Island), sought to challenge that Act's constitutionality on the ground that Congress as trustee could not give the submerged lands to the coastal states alone, this Court held (347 U.S. 273-274):

> The motions for leave to file these complaints are denied. Article IV, § 3, Cl. 2, United States Constitution. *United States* v. *Gratiot*, 14 Pet. 526, 537: The power of Congress to dispose of any kind of property belonging to the United States "is vested in Congress without limitation." *United States* v. *Midwest Oil Company*, 236 U.S. 459, 474: "For it must be borne in mind that Congress not only has a legislative power over the public domain, but it also exer-

> cises the powers of the proprietor therein. Congress 'may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them for sale.' *Camfield* v. *United States*, 167 U.S. 524; *Light* v. *United States*, 220 U.S. 536." *United States* v. *San Francisco*, 310 U.S. 16, 29-30: "Article 4, § 3, Cl. 2 of the Constitution provides that 'The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States.' The power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.'" *United States* v. *California*, 332 U.S. 19, 27: "We have said that the constitutional power of Congress [under Article IV, § 3, Cl. 2] is without limitation. *United States* v. *San Francisco*, 310 U.S. 16, 29-30."

Accordingly, the district court here correctly held that the Mining Act of 1872 is but one of a number of statutes, enacted by Congress under its constitutionally-delegated power, involving "economic, technological and philosophic considerations," which present legislative, not judicial, questions (Pet. App. 10A).

The decision below does not conflict with any decision of this Court, or of any other court of appeals, and presents no issue warranting review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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